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No. 03-701

In The

Supreme Court of the United States

JAMES S. and REBECCA DEATON,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fourth Circuit

BRIEF OF CALIFORNIA FARM BUREAU AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A three-foot wide roadside drainage ditch runs alongside the property of James and Rebecca Deaton in rural Wicomico County, Maryland. The roadside ditch was built and is maintained by the county roads department and connects to a ditch system operated by a public association established under state law to address local drainage problems. The Deatons dug a ditch on their property and, in so doing, disturbed an area the United States Army Corps of Engineers considers a wetland. There is no showing that common dirt – the pollutant at issue – left the Deatons' property, flowed into the roadside ditch, or reached any navigable in fact waters.

The questions presented are:

1. Are the roadside ditch and the wetland next to it "navigable waters" under the Clean Water Act?

2. Where activity in a wetland has not degraded either a nonnavigable roadside ditch next to the wetland or a downstream traditional navigable water, does Congress's commerce power over navigation allow federal regulation of that wetland or that roadside ditch?

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INTEREST OF AMICUS CURIAE[1]

The California Farm Bureau Federation ("CFBF") is California's largest farm organization with more than 89,000 member families in 53 county Farm Bureaus. It is a voluntary, nongovernmental, nonpartisan organization of farm and ranch families seeking solutions to the problems that affect their lives, both socially and economically. CFBF farm families contribute the majority of agricultural production in California, which saw its agricultural marketing reach $27.2 billion in 2000. Many of these families farm on lands that contain the types of seasonally wet ranch land at issue in this case.

CFBF is organized on a county, state and national basis in that order. The policies and programs of CFBF are developed from grassroots recommendations originating at the community and county Farm Bureau levels. From these recommendations, tentative policy resolutions are prepared and submitted to the CFBF House of Delegates for action at its annual meeting each December. The House of Delegates is made up of representatives elected by members of the county Farm Bureaus. Resolutions on state matters become CFBF policy.

In its present state, the Clean Water Act (hereinafter, alternatively the "CWA" or the "Act") is incomprehensibly vague. Farmers and ranchers – and indeed, federal regulators – have no reasonable or reliable means of determining the reach of the Act, simply because there are various, often inconsistent, interpretations of

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this *amicus* brief and that no entity other than *amicus*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this *amicus* brief. Letters reflecting their consent have been filed with the Clerk.

fundamental CWA terminology. For example, this Court itself eliminated CWA jurisdiction over "isolated waterbodies" in 2001,[2] and yet, similar isolated bodies of water are often considered "jurisdictional" under the CWA in some federal circuits.[3] As a result, CWA jurisdiction has become "circuit dependent." Because no two circuits apply the same interpretation, neither citizen nor regulator is capable of articulating the types of land or water features that are jurisdictional under the CWA.

CFBF believes it is imperative that the ambiguity and uncertainty inherent in the current interpretations of CWA jurisdiction be addressed by this Court at this time. This uncertainty is undermining agricultural production, not only in California, but nationwide. The relevance and importance of this controversy is illustrated by the fact that no less than three petitions arising from cases in three different circuits are now pending before this Court. Newdunn v. United States; No. 03-637; Rapanos v. United States, No. 03-929

CFBF has received the parties' written consent to file this brief as *amicus curiae* in support of Petitioners. Letters of consent have been filed with the Clerk of the Court.

SUMMARY OF ARGUMENT

Section 310(a) of the CWA prohibits the "discharge" of "pollutants" into "navigable waters" unless authorized by a permit or statutory exception. 33 U.S.C §1311(a). The term "pollutant" is defined to include, among other things, "rock," "sand," and "dredged soil." Id. § 1362(6). A "discharge" is "any addition" of a pollutant to

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[2] Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers ("SWANCC"), 531 U.S. 159 (2001).

[3] See, among others, Borden Ranch P'ship v. Army Corps of Eng'rs, 261 F.3d 810 (9th Cir. 2001).

"navigable waters" from any "point source." Id. § 1362(12). "Navigable waters" are defined by the CWA as encompassing "waters *of* the United States." 33 U.S.C. § 1362(7). (emphasis added).

The legislative history of the CWA provides ample guidance in determining the legislative intent of the Act. As is discussed in greater detail below, the Act was adopted to prevent and prohibit the *measurable degradation* of the nation's *navigable* waterways. This intent is supported by the plain language of the Act itself, which specifically defines navigable waters as waters "of" the United States. However, in attempting to extend the reach of the CWA, certain regulatory and judicial interpretations have eliminated common sense interpretation of CWA terminology, creating ambiguity, if not chaos, in the regulatory scheme. They have effectively amended the statute to cover not just waters "of" the United States, but arguably all waters *in* the United States. For example, the term "navigable water" is characterized randomly depending upon the federal circuit.[4] Likewise, the CWA's

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[4] Compare, for example, D.E. Rice v. Harken Exploration Co. (5th Cir. Tex.) 2001 WL 422051 (holding that "intermittent streams" and/or "seasonal creeks" do not fall under the purview of the Oil Pollution Act -- and, by implication, the CWA -- because they are neither "navigable" nor "sufficiently linked to an open body of navigable water") and United States of America v. Needham, et al., (5th Cir.) Dec. 16, 2003: Case No. 02-30217 (holding that CWA jurisdiction exists only over waters which are themselves either navigable-in-fact or immediately adjacent to "open" water) to U.S. v. Buday, 138 F.Supp.2d 1282 (Mont. 2001) (holding that ***any*** connection to navigable-in-fact water is sufficient to constitue "tributory" status for CWA purposes), and, more recently, to United States of America v. Adam Bros. Farming, Inc., et.al (U.S. Dist. Ct, Central Dist. CA) Dec. 8, 2003: Case No. CV 00-07409 CAS (on appeal to the 9th Circuit) (holding that CWA jurisdiction applies to ephemeral streams and property adjacent thereto despite fact that water from said stream had to traverse up hill to reach any navigable water body and that water from said stream was only

threshold requirement of an "addition" of a "pollutant," at least in some circuits, has been held to be virtually meaningless.[5] Indeed, these ambiguities have led to the instant petition for certiorari with regard to the Fourth Circuit's ruling on the "roadside ditch" and "adjacent" wetlands found on the Deaton property.

There is little to no difference between the physical features of the manmade "roadside ditch" on the Deaton property and farm furrows and associated ditches that must necessarily be excavated on millions of acres of private property in this Nation for agricultural production to take place. Indeed, the manmade ditch on the Deaton property is smaller in stature and carrying capacity than the majority of the agricultural ditches currently created and maintained for the production of fruit, vegetables, and fiber in virtually every state. As with the roadside ditch on the Deaton property, virtually every one of these agricultural ditches carries excess water that "flows" downhill, into some other conveyance ditch and sometimes, ultimately, to some navigable-in-fact water. Just as gutters carry excess water way from roofs and homes, the primary function of agricultural ditches and furrows is to carry excess water away from the crop itself.

The implication of CWA regulation over these millions of acres of agricultural furrows and ditches cannot be overstated. All water flows downhill. The Fourth

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alleged to reach a navigable body of water approximately 12 days per year).

[5] For example, the Ninth Circuit has held that an "addition" of a "pollutant may occur as a result of *any* movement of soil (even a fraction of an inch), reasoning that said soil somehow changes molecular structure when disturbed, thus constituting an "addition" of a new element from the same soil (the "pollutant"). See Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810 (9th Cir. 2001). This interpretation effectively nullifies the CWA's own threshold requirements.

Circuit ruling arguably extends federal jurisdiction to any land on which there is water that may flow downhill. Federal approval under the CWA for all work required to be undertaken by farmers seeking to create new row crops and associated ditches on property similar to that adjacent to the roadside ditch in the Deaton case is impeding agricultural production in this country.[6] This impediment is improper. First, the Clean Water Act itself was not intended to cover land features such as furrows and roadside ditches. Second, qualified and efficient local governmental bodies traditionally entrusted with responsibility over furrows and roadside ditches are being displaced by federal CWA intrusion, thus seriously affected the balance of federal/state relations. Finally, clear standards must be established which provide guidance for the legitimate factual finding of an "addition" of a "pollutant;" no citizen should be required to seek regulatory approval under a water quality statute when their actions will have no effect or a de minimus effect on water quality.

CFBF therefore respectfully requests that this Court grant the instant petition for certiorari and provide both citizens and regulators with some semblance of clarity – some measurable standard – by which to gauge the reach of the CWA.

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[6] See, e.g., United States of America v. Adam Bros. Farming, Inc., et.al , at footnote 4, supra, and Borden Ranch Partnership v. United States Army Corps of Engineers, at footnote 5, supra.

ARGUMENT

I. ADHERENCE TO THE FOURTH CIRCUIT'S "EVENTUALLY FLOWS" THEORY WOULD SIGNIFICANTLY IMPACT AND DISRUPT ROUTINE AGRICULTURAL PRODUCTION

A. Construction And Maintenance of Ditches and Furrows are Necessary for Agricultural Production

Webster's Dictionary defines the term "furrow" as "1. a trench in the earth made by or as by a plow. 2. any narrow channel, or groove. 3. plowed land; field."[7] Prior to agricultural planting, furrows are created between rows of a multitude of crop varieties, including lettuce, celery, broccoli, cauliflower, strawberries, and cotton. In California alone, there are more than 7.5 million acres of irrigated fields at any given time during a calendar year.[8] Furrow irrigation (also known as "flood irrigation") serves two primary purposes with regard to agricultural production: (1) it provides an efficient and economical system of irrigation, and (2) it provides a means of diverting excess water away from the producing field when it rains too much.

It is this latter purpose that creates the necessity of building some mechanism to accommodate excess water from agricultural fields. For this reason, agricultural furrows are constructed on a slight slope, a design that

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[7] Webster's New International Dictionary (William A. Neilson ed., 2nd ed. 2000).

[8] USDA - *National Agricultural Statistics Service* 1992 *Census of Agriculture*, Volume 1: Part 05, Chapter 1: CALIFORNIA

allows excess water to be discharged into larger centralized ditches located on the perimeter of the furrowed fields. Like all free water, the excess water in these ditches runs downhill. Depending on the circumstances, some of this water may well flow into a navigable in fact water body, such as a river or an ocean, many miles away. In Western States, many of these water bodies are ephemeral in nature, running to a navigable water only during the largest storm events.

Such furrows and ditches are as necessary to agricultural life as storm drains and gutters are to life in the city. No one would suggest that the water in the gutter converts the gutter into a water of the United States for purposes of CWA jurisdiction.

B. The Clean Water Act Was Never Intended to Support Federal Jurisdiction Over Agricultural Ditches/Furrows And Wetlands Adjacent To Said Ditches/Furrows

Congress passed the CWA in 1972 in reaction to incidences involving heavily polluted navigable waters, such as the burning of the Cuyahoga River cited in SWANCC.[9] The authority granted to the Corps by Congress has not been expanded since the Corps promulgated its own regulations of the CWA in 1974.

As originally interpreted by the Corps and intended by Congress, the term "navigable waters" meant the following: "those waters *of* the United States which are subject to the ebb and flow of the tide and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33

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[9] 531 U.S. at 175 (Stevens, J. dissenting).

C.F.R. §209.120(d)(1) (1974) (emphasis added). The "General Policies" subheading of the 1974 regulations specifically provided that, "[t]he term 'navigable waters of the United States' is used to define the scope and extent of the regulatory powers of the Federal government." 33 C.F.R. §209.260(b)(1974). This Court most recently interpreted these regulations in SWANCC.[10] In that case, this Court reaffirmed the fact that the Corps' own regulations "emphasized that '[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor [in deciding jurisdiction].' 33 C.F.R. §209.260(e)(1)." SWANCC, 531 U.S. at 168. Perhaps more importantly, the Court also noted that there was nothing in the legislative history to signify that "Congress intended to exert anything more than its commerce power over navigation." Id. at 168 n.3.

Although not binding, Justice Stevens' dissent in SWANCC provides some guidance as to the limits imposed on the CWA by the majority opinion: "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be made so." SWANCC, 531 U.S. at 172 (Stevens, J. dissenting). In the dissent, Justice Stevens carefully explained his understanding that the majority opinion effectively excluded from CWA jurisdiction (a) tributaries and wetlands that are not contiguous or adjacent to navigable waters, and (b) "other waters" such as "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." Id. at 188 fn. 14 (internal quotes omitted).

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[10] 531 U.S. 159 (2001).

Ultimately, the holding in SWANCC is consistent with both the plain language of the CWA and its legislative history. The only Corps actions limited by the SWANCC opinion are those which were never approved or intended by Congress in the first place.

Nevertheless, despite the clear intent of both legislative history and the Corps' own regulations, and despite the clear mandate set forth in SWANCC, the Corps continues to press an overreaching interpretation of the CWA, asserting jurisdiction over "roadside" and "agricultural" ditches which have little or no connection with navigable bodies of water and which have traditionally and effectively been managed by local entities.

Indeed, as is evidenced by numerous cases, both the Corps and some lower courts have ignored the CWA and this Court's holding in SWANCC (see Buday and Adam Bros., fn. 4, supra; see also Borden Ranch, fn. 5, supra). Equally as disturbing is the fact that most CWA "enforcement actions" based upon these overreaching interpretations never reach the judicial system. The vast majority of enforcement actions are undertaken through "administrative orders" against family owned, land dependent businesses (e.g. agricultural and ranching operations) that are financially incapable of mounting a jurisdictional defense despite the weight of authority in their favor. These actions have produced a chilling effect on such landowners. As it is currently implemented by the Corps, the CWA prohibits private property owners from undertaking the following acts without first securing federal acquiescence; (a) tilling dry land, (b) clearing flood channels choked with overgrown vegetation, and (c) changing the use of a given parcel from cattle grazing to cropland. In fact, depending upon which regulator is interpreting the CWA, alteration of different agricultural

commodities within a single field may be subject to Corps approval.[11]

Of course, as is abundantly evident by the above history and case law, Congress did not intend to regulate all water in the United States, and therefore federalize regulation of traditionally local land use matters and agricultural activities when it adopted the CWA. It did not envision when it enacted the CWA and its alleged "farmer exemptions" (§404(f)(1)) that a farmer or rancher desiring to plow his field to plant higher value crops – a normal activity engaged in since colonial times—would require a federal permit to dig an irrigation ditch in the middle of a field to handle excess water

The Fourth' Circuit's ruling affirming the reach of CWA jurisdiction to the Deaton's "roadside ditch" gives credence to the above described impermissible – and likely unconstitutional – interpretation of the Act. It is and will continue to have the effect of preventing otherwise legal ranching and farming activities on both improved and unimproved properties. Unless and until these illegitimate

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[11] As the 9th Circuit recently noted, "Any discharge of dredged or fill material into the navigable waters incidental to ***any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject***, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced, shall be required to have a permit under this section. 33 U.S.C. §1344(f)(2)... Although the Corps cannot regulate a farmer who desires merely to change from one ***wetland crop*** to another, ***activities that require substantial hydrological alterations require a permit***" (emphasis added, internal quotes omitted) Borden Ranch Partnership v. United States Army Corps of Engineers, 261 F.3d 810, 816 (9th Cir. 2001). Like so much of the CWA and its attendant regulations, the above-cited interpretation is both wholly subjective and impermissibly vague. More importantly, it supports the unauthorized and unsupported notion that agricultural producers are required to seek Corps permission before altering traditional dryland corps (e.g. beans and cotton) to more water intensive crops (i.e. rice and strawberries).

interpretations are checked, agricultural production – and indeed, economic production of all kinds – will continue to be unnecessarily weakened.

C. The Imposition of Federal Clean Water Act Jurisdiction Over Agricultural Ditches and Furrows Would Undermine Local Management Practices

The Corps has long maintained that drainage ditches constructed on dry land, are ***not*** waters of the United States for CWA purposes. In the regulatory preamble to a revision of its Nationwide Permit ("NWP") regulations in 2000, the Corps responded to criticism that it had illegally asserted jurisdiction over drainage ditches as follows:

> "A drainage ditch constructed in a stream, wetland, or other water of the United States remains a water of the United States, provided an OHMW [ordinary high water mark] is still present. Since drainage ditches constructed in waters of the United States are constructed either by channelizing a stream or excavating the substrate to improve drainage, it is unlikely that the drainage ditches will become dry land unless the hydrology is removed. District engineers will determine, on a case-by case basis, whether a particular area is a water of the United States. If the construction of a drainage ditch has legally converted the area to dry land, then the area drained is not a water of the United States, however, in most cases the drainage ditches would remain a water of the United States.
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> The statement that non-tidal drainage ditches are waters of the United States if they extend the

> OHWM of an existing water of the United States is consistent with the final rule published in the November 13, 1986 Federal Register and applies to ditches constructed in waters or that connect waters. ***Nothing in the NWP notice was intended to change the November 13, 1986 Federal Register notice which states that drainage ditches constructed entirely in upland areas generally are not considered to be waters of the United States.***
>
> Drainage ditches constructed in uplands that connect two waters of the United States may be considered waters of the United States if those ditches constitute a surface water connection between those two waters of the United States. As previously noted, drainage ditches constructed entirely in uplands generally are not considered to be waters of the United States. District Engineers will use the criteria at 33 CFR 328.3(e) to determine the presence and extent of an OHMW that may have developed in a drainage ditch. "[12]

If CWA jurisdiction were applied to agricultural ditches and furrows as the Forth Circuit has suggested it should, the result would be an inability for the vast majority of the nation's farmers to produce crops in a viable and reasonable manner. As discussed above, in California alone, there are more than 7.5 million acres of irrigated fields at any given time during a calendar year. California's 88,000 farms cover about one-third of the state's total land area. California ranks fifth nationally in farm numbers, but farms in the State produce more than half of the nation's fruits, vegetables and nuts from just 3 percent of the nation's farmland. One California farmer supplies enough

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[12] 65 Fed. Reg. 12818, 12823-12824 (March 9, 2000) (emphasis added)

food, fiber and flowers for 135 people.[13] Were each furrow and ditch on these fields subject to regulation under the CWA, farming as we now know it would cease to function. Every time a farmer wished to plow a field (a decision which is often market driven, and therefore, extremely time dependant), he or she would be required to seek a Section 404 permit based upon either (a) the existence of an OHWM within each furrow, and/or (b) the possibility, however remote, that excess water flowing downhill after being used to irrigate a field could wind up in a navigable in fact water body. This scenario – a scenario supported by the Fourth Circuit's decision in Deaton – is untenable. Farmers are left with a Hobson's Choice[14]: either they submit to the cumbersome and subjective regulatory process at the expense of production value or they face civil or criminal enforcement proceedings for historically autonomous activities which have always been permissible, if not encouraged. Given the Fourth Circuit's interpretation of the CWA, farmers would be faced with constant permitting requirements or they would face potential civil and criminal enforcement proceedings.

As agricultural producers are all too keenly aware, the CWA is not the only statute that regulates water in the United States. For example, California, like all other states, has a number of public entities that currently regulate agriculture and natural resources such as water.[15] There are

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[13] California Farm Bureau website- *Facts and Stats about California Agriculture 2002* as complied by the California Farm Bureau Federation's Communications/News Division. See http://www.cfbf.com/info/agfacts.aspx

[14] The origin of the term *Hobson's choice* is said to be in the name of one Thomas Hobson (ca. 1544-1631), at Cambridge, England, who kept a livery stable and required every customer to take either the horse nearest the stable door or none at all.

[15] Public entities in California that currently implement water quality and quantity issue enforcement include, but are not limited to; the state

literally hundreds of state and local laws that regulate all aspects of land management, from all different perspectives. In addition, California has a number of laws that were enacted specifically to protect the environment, some of which were modeled on the Clean Water Act.[16] Local autonomy over such issues was the intent of Congress when it enacted the CWA. Congress explicitly provided that states develop local land use requirements and other mechanisms to control non-point sources of potential pollution.[17] As pointed out in the Deaton's petition, the purpose of these requirements was that

> [C]itizens must have some means of knowing which of the two governments to hold accountable for the failure to perform a given function. 'Federalism serves to assign political responsibility, not to obscure it.'[18]

Irrespective of the many local and state regulations, given the split of the circuits and the varying interpretations of the CWA and its terms by regulators, a landowner may conduct certain activities in one district but be prosecuted under the CWA for the same activities in another.[19] The

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water resource control board, local flood control boards, local water management boards, local agricultural commissions, the coastal commission, and local planning departments.

[16] See e.g. California Public Resources Code § 2100 et seq. (CEQA) and California Water Code §1300 et seq.

[17] See, e.g., 33 U.S.C. § 1288(b)(2)(F); § 1313(f); § 1314(f); and § 1329 governing storm water runoff.

[18] See Deaton Petition at 22, United States v. Lopez, 514 U.S. 549 at 576 (Kennedy, J., concurring) (1995).

[19] See e.g. *Final Summary Report: Guidelines For Jurisdictional Determinations For Waters Of The United States In The Arid Southwest*, prepared by the Army Corps of Engineers South Pacific Division June 2001, §2.2 Definition of Waters of the United States ("Although the above water bodies are typically not considered waters of the United States, the Corps of Engineers reserves the right, on a case-by-case basis, to determine that a particular water body within the

disparate treatment is not based on state or local regulations, but on the different interpretations of the CWA in various districts and courts, as well as in the minds of the various regulators charged with enforcement of the Act's provisions. As illustrated above (see fn.4, supra) the Fourth, Fifth and Ninth Circuits have taken widely divergent views over what constitutes a regulatable water after SWANCC.[20] This divergence in opinion poses a serious threat to America's farming communities across the country, given the uncertainty it creates and the effective usurping of state or local authority.

SWANCC should have been a limiting force to the federal government's past practice of utilizing the CWA to assert jurisdiction over any and all types of land (whether wet or dry) by bootstrapping said land into a manufactured and congressionally unsupported definition of "waters of the United States." However, given the inability of regulators and the courts to agree on the effect of SWANCC on the definition of "waters of the United States," further clarification is necessary.

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above categories represents a jurisdictional water of the United States."); 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (Corps "generally" does not consider ditches excavated on dry land to be waters of the United States, but may claim otherwise "case-by-case").

[20] While the Ninth Circuit has taken a seemingly narrow interpretation of SWANCC in CWA cases directly (Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001)), it affirmed the importance of SWANCC in Katie John et. al. v. United States, 247 F.3d 1032 (2001). Although Katie John is admittedly distinguishable from the instant case in that it involved different facts and the interpretation of a different statute, Katie John is nevertheless notable for the Ninth Circuit's deferential treatment of the SWANCC decision, both by the majority opinion and the dissent.

CONCLUSION

Amicus respectfully urge this Court to grant the petition.

Respectfully submitted,

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